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THE NORTHERN SECURITIES CASE.

The federal government has won an important victory and merited the congratulations of the public in securing a favorable construction by the United States Supreme Court of its position in the now celebrated case against the Northern Securities Company. This decision, while it unfortunately lacks the moral force which unanimity would have given it, is accompanied and strengthened by an opinion by Justice Harlan, of such remarkable clearness and forcefulness of logic and diction as to justify us in the prophesy that it will stand for years as the most authoritative construction of the Sherman Act and of what goes to constitute a combination in restraint of interstate commerce.

The court, in referring to the facts, came to this conclusion about them, that, under the leadership of Hill and Morgan, the stockholders of the two railroad companies, having practically parallel lines of road, had combined under the laws of New Jersey by organizing a corporation for the holding of the shares of the two companies upon an agreed basis of value.

In describing the actual effect or tendency of such a combination the court said: "Necessarily by this combination or arrangement, the holding company in the fullest sense dominates the situation in the interest of those who were stockholders of the constituent companies; as much so, for every practical purpose, as if it had been itself a railroad corporation which had built, owned and operated both lines for the exclusive benefit of its stockholders. Necessarily, also, the constituent companies ceased, under such a combination, to be in active competition for trade and commerce along their respective lines, and have become practically one powerful consolidated corporation, by the name of a holding corporation, the principal, if not sole object for the formation of which was to carry out the purpose of the original combination, under which competition between the constituent companies would cease. * * * The mere existence of such a combination and the power acquired by the holding company as trustee for the combination, constitute a menace to and a restraint upon that freedom of commerce which congress intended to recognize and protect and which the public is entitled to have protected."

At this juncture the court enters into an exhaustive examination of the authorities which have construed the Sherman Act and which are familiar to every well-read lawyer. The one fault that has been found with these authorities has been that in no one of them has the task been undertaken to harmonize or codify, if the expression may be permitted, the judicial construction of this famous statute. This task is undertaken by Justice Harlan in the present case. From his review of the authorities, Justice Harlan deduces the following propositions:

"That although the act of congress, known as the anti-trust act, has no reference to the mere manufacture and production of articles or commodities within the limits of the several states, it embraces and declares to be illegal every contract, combination or conspiracy, in whatever form, or of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations.

That the act is not limited to restraints of interstate and international trade or commerce that are unreasonable in their nature, but is directed against all direct restraints, reasonable or unreasonable, imposed by any combination, conspiracy or monopoly upon such trade or commerce.

That railroad carriers engaged in interstate or international trade or commerce are embraced by the act.

That combinations, even among private members or dealers, whereby interstate or international commerce is restrained, are equally embraced by the act.

That congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the anti-trust act, has prescribed the rule of free competition among those engaged in such commerce.

That every combination or conspiracy which would extinguish competition between otherwise competing railroads, engaged in interstate trade or commerce, and which would in that way restrain such trade or commerce, is made illegal by the act.

That the natural effect of competition is to increase commerce, and an agreement, whose

direct effect is to prevent this play of competition, restrains instead of promotes trade and commerce.

That to vitiate a combination, such as the act of congress condemns, it need not be shown that such combination, in fact, results, or will result, in a total suppression of trade or in a complete monopoly, but it is only essential to show that by its necessary operation it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition.

That the constitutional guarantee of liberty of contract does not prevent congress from prescribing the rule of free competition for those engaged in interstate and international commerce.

That under its power to regulate commerce among the several states and foreign nations, congress had authority to enact the statute in question."

One of the strongest arguments of the defendants was that of the inviolability of the right of a state to create a corporation for any purpose. The Northern Securities Company, it was contended, was merely a holding company organized under the laws of New Jersey, and authorized to buy, sell and hold stocks as an investment, and that the government had no authority to compel it to give up its investments. In answer to this Justice Harlan says: "An act of congress, constitutionally passed under its power to regulate commerce among the states and with foreign states, is binding upon all as much so as if it were embodied in terms in the constitution itself. Every judicial officer, whether of a national or a state court, is under the obligations of an oath to so regard a lawful enactment of congress. Not even a state, still less one of its artificial creatures, can stand in the way of its enforcement. If it were otherwise the government and its laws might be prostrate at the feet of local authority."

As to the device of a "holding company" as disguising the combination, Justice Harlan set aside as fallacious the argument that the acquisition of stock by the Northern Securities Company was in the nature of an investment, saying that there had been no actual investment in any substantial sense. In this connection he referred to Mr. Morgan as authority for the statement that the stock had been transferred to the securities company mainly for the purpose of suppressing competition, and in support of this statement quoted the testimony of Mr. Morgan in which he had said that the securities company had been created a custodian because it had no other alliances. "This," said Justice Harlan, "disclosed the actual nature of the transaction, which was only to organize the securities company as a holding company, in whose hands, not as a purchaser or absolute owner, but simply as custodian, were to be placed the stocks of the constituent companies." The reason of the decision lies in this quotation. It may be that a corporation and certainly an individual may buy as an investment any stocks on the market which he may be able to acquire. That, however, has nothing whatever to do with a case in which it is proven that a combination of several persons existed to gain a monopoly over interstate commerce by any means whatever. The means may be innocent and legitimate but that does not prevent a court of equity from breaking through the whited sepulchre and raking out the rottenness therein: "What the government particularly complains of," says Justice Harlan, "indeed, all that it complains of here, is the existence of a combination among the stockholders of competing railroad companies, which, in violation of the act of congress, restrains interstate commerce through the agency of a combination, corporation or trustee designed to act for both companies in repressing free competition between them."

Since the vote on affirmance of the judgment of the lower court was five to four, Justice Brewer, one of the judges voting for affirmance was in a position, if he desired, to set a limitation to the reasoning of the court, as expressed by Justice Harlan, and he took advantage of the opportunity to the extent of declaring a modification of the opinion as follows: "Freedom of action is among the inalienable rights of every citizen. If, applying this to the present case, it appeared that Mr. Hill was the owner of a majority of the stock in the Great Northern Railway Company, he could not by any act of congress be deprived of the right of investment of his surplus means in the purchase of stock of the Northern Pacific Railway, although such purchase might tend to vest in him through that ownership a control over both companies. In other words, the right which all other citizens had, of purchasing

Northern Pacific stock, could not be denied to him by congress because of his ownership of stock in the Great Northern company."

Judge Thayer in a recent interview had this to say in reference to the decision of the supreme court in this case: "I am naturally much gratified by the decision of the supreme court. My gratification is not so much because the court's action is an affirmance of a judgment in a case which I helped to try and determine, and in which it devolved upon me to write the opinion, but because the principles of law enunciated in the decision will be of great value to the country. In my judgment it would have been little less than a public misfortune if the supreme court had sanctioned the doctrine that, notwithstanding the Sherman anti-trust law, a corporation could be created, having no business of its own to transact, but merely to hold the stocks of other corporations, and thereby control them.

It requires but little foresight to see that if such holding corporations are tolerated, it is not only possible, but extremely probable, that within a few years a few men would control all of the transportation facilities and all of the industrial enterprises in the United States; and in the end, by virtue of such control, would be even stronger than the government itself. The Sherman anti-trust law was certainly intended to prevent such vast combinations, and I am glad to know that, as interpreted by the court of last resort, it is effectual for that purpose."

NOTES OF IMPORTANT DECISIONS.

TRIAL AND PROCEDURE—EFFECT OF THREE SUCCESSIVE VERDICTS IN FAVOR OF THE PLAINTIFF ON THE THIRD APPEAL. — Some of our appellate courts have shown such a hostility to jury verdicts in damage suit cases that they will reverse them on the most trivial technicality and continue to do so on subsequent appeals despite the repeated verdicts of the jury in the plaintiff's favor, until they have worn the plaintiff out, either physically or financially. In view of this it is gratifying to note the limitation which the Supreme Court of Georgia sets upon its own right to overrule the verdict of the jury where the same verdict is granted on three successive trials. In the recent case of Southern Railway Co. v. O'Bryan, 45 S. E. Rep. 1000, that state holds that where there have been three trials of an action and three successive verdicts for plaintiff, on a subsequent reversal for error, and a remanding of the case for a new trial, the plaintiff's right to recover should not be open to question, and the only question submitted should be the amount of recovery. The court said: "As stated above there have been three trials of this case, and three successive verdicts in favor of the plaintiff. There ought to be an end of this litigation. We think the ends of justice and the due administration of the law require that the plaintiff's right to a recovery of some amount ought not to be longer open to controversy. We direct, therefore, that on another trial the judge instruct the jury that the plaintiff is entitled to recover, and submit to them only the question as to the amount of damages she has sustained." See also Central Railroad v. Raiford, 82 Ga. 400, 9 S. E. Rep. 169.

COPYRIGHT—IS A PARODY AN INFRINGEMENT OF COPYRIGHT?—The theatrical profession have for many years been making earnest efforts to extend the protection of the copyright laws to cover histrionic inventions. The difficulty of extending copyright protection to such phases of dramatic art is shown by the recent case of Bloom v. Nixon, 125 Fed. Rep. 977, that a parody on a copyrighted dramatic musical composition sung by another in imitation of the postures and gestures of the original actress in the copyrighted extravaganza, was not a violation of copyright. The court offers this interesting argument as to the distinction which it claims to exist between a parody and an unlawful imitation of a popular song:

"Assuming for the present purposes that a lyric is capable of being 'performed or represented' in the sense that should be given to those words as they are used by the statute, the question remains, is the song in fact being performed or represented? In my opinion, the question should be answered in the negative. What is being represented are the peculiar actions, gestures and tones of Miss Faust; and these were not copyrighted by the complainant Bloom, and could not be, since they were the subsequent device of other minds. It is the personality imitated that is the subject of Miss Templeton's act, modified, of course, by her own individuality, and it seems to me that the chorus of the song is a mere vehicle for carrying the imitation along. Surely a parody would not infringe the copyright of the work parodied, merely because a few lines of the original might be textually reproduced. No doubt, the good faith of such mimicry is an essential element; and, if it appeared that the imitation was a mere attempt to evade the owner's copyright, the singer would properly be prohibited from doing in a roundabout way what could not be done directly. But where, as here, it is clearly established that the imitation is in good faith, and that the repetition of the chorus is an incident that is due solely to the fact that the stage business and the characteristics imitated are inseparably connected with the particular words and music. I do not believe that the per-

formance is forbidden either by the letter or the spirit of the Act of 1897. The owner of the copyright is entitled (upon the assumption heretofore stated) to be protected from unauthorized public performance or representation of the song, in order that whoever might desire to hear 'Sammy' sung in public would be obliged to attend a performance of 'The Wizard of Oz;' and, as it seems to me, he still has that protection. The song is only sung publicly in that extravaganza. Fay Templeton does not sing it, she merely imitates the singer; and the interest in her own performance is due, not to the song, but to the degree of excellence of the imitation. This is a distinct and different variety of the histrionic art from the singing of songs, dramatic or otherwise. and I do not think that the example now before the court has in any way interfered with the legal rights of the complainants."

IS THE INITIATIVE AND REFERENDUM REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES?

I have read with much interest the able discussion of the initiative and referendum by Judge Sherwood[1] and Mr. O. D. Jones[2] in previous numbers of the CENTRAL LAW JOURNAL as well as the editorial comments thereon. While I recognize the full force of Judge Sherwood's able argument in support of his contention that the innovation known as the initiative and referendum is obnoxious to the constitution of the United States, yet I am not ready to agree that the last word has been said upon this important question. The last two or three years have witnessed a rapid growth in public sentiment in favor of some practical system of public control over legislation and it seems inevitable that some form of the initiative and referendum will be tried in many of the western states, at least, if not in the eastern, in the next few years. In the following states steps have been taken to establish this important change in the method of legislation, viz: South Dakota, Utah and Oregon. And in many of the cities farther east some practical system of "home rule" is in operation. If a number of these states shall succeed in their efforts, as they doubtless will, the questions raised by Judge Sherwood will certainly find their way to the United States Supreme Court for settlement. Until then the people of the states seeking to thus amend their fundamental law, and their legislators, will necessarily have to grope in the dark to some extent, uncertain of the final outcome. At the outset, suppose it be admitted that Judge Sherwood is correct in the objections he makes to the amendment proposed by the committee to the Missouri constitution? Does it follow that no amendment of similar character would be valid? That proposed amendment was very radical and decidedly peculiar in some respects. May not the essential features of the initiative and referendum be embraced in an amendatory act and yet omit provisions that would be in conflict with the provisions of the federal constitution requiring that "the United States shall guarantee to every state in the union a republican form of government?" Quoting from Judge Sherwood's article in 56 CENTRAL LAW JOURNAL, it appears that the amendment proposed by the Missouri legislative committee contained these sweeping declarations:

"The legislative power of this state is inherent and shall be vested in the electors of this state, and also shall be vested, subject to acceptance or rejection by the electors of this state, in the senate and house of representatives," etc. * * * "The legislative power of any municipal division of the state (such as county, city, town, village, township, school district, etc.), on its own municipal matters is inherent and shall be vested in the electors of such municipal division, subject to such laws of a general nature, having uniform operation throughout the state, as the electors of the general assembly may enact." Undoubtedly this, if adopted, would make a radical change. Under other provisions of the proposed amendment the legislature could still independently enact "all laws for the immediate preservation of the public peace, health and safety" by a two-thirds vote of each house. Thus the law-making power would be vested partly in the electors and partly in their representatives. But suppose this is true, does the government of the state cease to be a representative government? What of the other two co-equal branches, the judicial and executive? They remain unchanged. Shall a transfer of a part of the legislative power of the people's representatives in the general assembly to the electors, with no change whatever in the power of the people's representatives in the judicial and executive branches, be given

[1] 56 Cent L. J. 247.
[2] 56 Cent. L. J. 393.

such a revolutionary effect as to destroy the "republican form" of the state government? How much or how little of the legislative power of the general assembly must be taken away and conferred upon the electors before the "republican form" of the state government will be destroyed? Where is the dividing line? Is it any worse for part of the law-making powers of the general assembly to be taken away by the people, under a constitutional amendment, than for the legislature to give it away by its own enactments? For instance, in Indiana the people have been given a veto power as to franchises for city monopolies. And the Wisconsin legislature has conferred a similar power on the electors of cities. All are familiar with the notable action of the last Illinois legislature in conferring upon the electors of cities the veto power as to street railway franchises. And in many cities like powers are exercised by voters under charters granted by legislatures, as for instance, Denver, Los Angeles, Portland, Sacramento, Seattle, and San Francisco. And the application of the local option idea has become so general in all the states that it is no longer questioned. Public schools were established by means of it in Maryland in 1825, in Pennsylvania in 1836, in Texas in 1888, in Virginia in 1885 and in Kentucky in 1873. Local option in reference to the retail liquor traffic, as is well known, is in vogue in nearly all the states.

It may be objected that strictly and in a technical sense, the enactment of a law by the legislature, with a provision in it for a popular vote in the nature of a veto before it can go into effect, does not amount to a giving away of legislative power. Yet in effect the legislature relinquishes part of its powers to the electors whenever it submits its enactments to their approval. As we shall see, it is perfectly constitutional and proper for the legislature to do this. If, then, the legislature may employ the referendum, how much greater is the right and power of the electors to do so by means of a constitutional amendment, and to direct the legislature to employ it. First, then, let us clear the way by disposing of that step in direct legislation known as the referendum.

So far as the referendum is concerned it may be dismissed at once from the discussion. The great weight of authority now seems to support the rule that: "While the legislature cannot delegate its power to enact laws, it may provide that whether or not a law enacted shall be operative, may be made to depend upon the popular will."[3] And of course, in most, if not all, of the states where this rule prevails the constitutions vest the legislative power in the legislature exclusively. The subjects of legislation covered by the cases cited under the rule, and others are: Establishment and control of schools; creation and division of counties; establishment and change of county seats; creation of municipalities, amendment of charters and changing boundaries; issue of bonds by county or city and subscriptions to corporate stock; adoption of fence or stock laws. In all these and similar cases the enactment of the law is by the representatives of the electors. But, as the law-makers are only agents, they may and do refer their action to their principals, the electors, for their approval or disapproval. Certain it is and beyond question, that in so doing the representative character of the government of the state is neither destroyed nor modified. Indeed, the representation of the electors in the making of the laws is more perfect and effectual. Herein lies a safeguard against misrepresentation, so often and justly complained of in these times of overpowering influence of the lobby. It follows, then, that the referendum feature of direct legislation is invulnerable to the objections raised by Judge Sherwood.

The Initiative. — In the consideration of the initiative do we find the objections any more serious? The first question presented for settlement is: Under existing state governments where does the final power as to the making, interpretation and execution of the laws reside? Is it not in the electors? For

[3] 10 Cent. Dig. ch. 1393 to 1402 and cases, viz: Leger v. Rice, Fed. Cas. No. 8,210; Hobart v. Butte Co. Sup'r, 17 Cal. 23; Robinson v. Bidwell, 22 Cal. 279; People v. Salomon, 51 Ill. 37; Erlinger v. Boneau, *Id.* 94; Guild v. City of Chicago, 82 Ill. 472; Lytle v. v. May, 49 Iowa, 224; Clarke v. Rogers, 81 Ky. 437; Wales v. Belcher, 20 Mass. 508; State v. Pond, 93 Mo. 606, 6 S. W. Rep. 469; State v. Noyes, 30 N. H. 279; Noonan v. Hudson Co., 51 N. J. L. 454, 18 Atl. Rep. 117; Grant v. Courter, 24 Barb. 232; Smith v. McCarthy, 56 Pa. St. 359; State v. Copeland, 3 R. I. 33; L. & N. R. R.Co. v. Davidson, 33 Tenn. 637, 62 Am. Dec. 424; State v. Parker, 26 Vt. 357; Rutter v. Sullivan, 25 W. Va. 427; State v. O'Neill, 24 Wis. 149; Smith v. City of Janesville, 26 Wis. 291.

instance, do not the electors first adopt the constitution, conferring certain powers upon their representatives and fixing certain limitations to those powers? The power thus conferred comes from the people and the limitations upon the exercise of it are prescribed by the people. The instrument provides for certain executors of the laws and courts to interpret them, within the limitations contained in the fundamental act adopted by the people. The right to amend the fundamental law is reserved to the people. It goes without saying that under the constitution all public officials are merely agents of the people and derive all their power from them, and hence, that the final power in legislation resides in the electors. The next question is: What is the initiative? In answering this question we are aided by the excellent definition given by George H. Shibley, of the Bureau of Economic Research at Washington in his excellent article on "The People's Veto and Direct Initiative" in *The New Voice* of July 2, 1903. Mr. Shibley is among the most eminent and best informed students and advocates of the initiative and referendum. He says:

"The voters' direct initiative is that in which a specified number (5, 10 or 15 per cent.) can unite in proposing a measure to the legislative body, which, after due consideration, including the taking of testimony and hearing of argument, must refer the bill to a direct ballot of the people and along with it a competing bill or other recommendation, if the legislative body so desires. The voters simply take their choice or reject both."

Then Mr. Shibley asserts that this system (not some other) is in vogue in Switzerland, Canada, Australia, New Zealand and England, besides in some of our states. Let it be noted that the measure proposed by the people is presented to the legislature and acted upon by it. That body may reject it and propose something else, after giving it full consideration, but it must refer it to the electors for a final vote.

Which step in this procedure is destructive of the "republican form" of the government? Is it the first step, consisting of the initiative proper, the presentment of the measure by the electors to their representatives in legislature assembled? This is really the new feature in the process of law making. What is the vice in it? True it is that under the present system the right of initiative rests entirely in the people's agent in the legislature. He may introduce a measure or refuse to at his pleasure and there is no way to compel him to do either. But if this exclusive right in him shall be so modified as to require him to share it with the electors, his principals, will the "republican form" of the state government be thereby shattered? Will the state government thereby become any the less "a government by representatives, chosen by the people," to quote from Judge Cooley? Is the exclusive right of the representative to initiate legislation so fundamental, so essential an element in the republican form of government as that if it be thus modified the character of the government will be fatally changed? On the other hand it is clear to my mind that the representative character of the law-making body will be greatly improved by permitting the electors to force their representatives in legislature assembled to the consideration of measures of public interest. When the agent neglects his principal's business the latter ought to be in position to set him in motion, he being left free, however, to approve or disapprove the measure suggested by his principal. With this relation once established between the elector and his public agent, true representative government will be enlarged, not lessened. Or, is it the mandatory feature of the initiative, requiring the legislative body to consider the proposed measure and then submit it to the electors, which is the fatal requirement? As to the first of these duties, to consider the measure, it already rests upon the legislator, as to every measure presented in the form of a bill or resolution. So no new duty is imposed in this respect. As to the second requirement, submission of the measure to the electors, this is the referendum. Of course it is intended to be mandatory upon the legislature to thus submit the measure for a final vote. What, if any, is the vice in this requirement? It must be found here if anywhere, for it is not in the referendum itself. For, as we have seen, it is already well settled that the referendum is perfectly proper and constitutional. But the vice cannot be in the mandatory feature of the referendum, for the legislature is left free to approve or disapprove the proposed measure and if it shall disapprove it may

submit an entirely different proposition to the electors. Thus the legislative body acts freely upon the proposed measure, and this is the decisive test. In reality, whether the measure originates with the legislator or with the elector by petition, it does not matter. The essential act comes at the end when the elector has an opportunity to apply his veto; and this step in the process is clearly valid and constitutional. If there is no destructive force in either step in the process standing alone, then it cannot be discovered in all of the steps combined; unless upon the theory of the chemist who combines innocent elements to produce a deadly compound.

Under this system the legislature is preserved intact. But the people's agents are not given a free rein to do as they please. The electors hold the reins themselves so as to compel their agents to represent them. "Public office is a private snap" has become the motto of too many legislators. They greedily pocket all of the "emoluments" of office, both legitimate and illegitimate and freely exercise their own sweet will upon all questions without reference to the interest of their principals, the dear people. They easily yield themselves servants to any and all masters for a consideration and thus often thwart the will of the electors whom they were chosen to represent. Hence, representative government, though existing in name often fails in practice, so far as the law-making branch of it is concerned. The initiative and referendum is designed to correct this evil and make the representative form of government effective in practice, rather than to destroy or supplant it.

The Missouri Proposition. — From all of the foregoing it becomes clear that the amendment proposed to the Missouri legislature by the committee, as quoted by Judge Sherwood, contains much that does not belong to the initiative and referendum. The provision I have quoted declaring that the "legislative power" is inherent in the electors and in the general assembly is foreign to the purpose of the initiative and referendum. But this might be passed as a harmless declaration except for what follows in section three, viz:

"A number of the electors of this state, equal to seven per cent. of the total number of votes cast at the last preceding general election for governor, shall have the power to propose any law, amendment to or repeal of a law and require that it be referred to the electors of the state to be voted on at the next general or special election, provided the election does not occur within ninety days after the filing of the petition with the secretary of state, and such law shall be in effect from and after the date of the official declaration of the result of the vote, if approved by a majority of those voting thereon."

This is entirely outside of the initiative and referendum. It is legislation by the electors directly without the agency of the legislature in any respect. This certainly is revolutionary. If adopted in Missouri they would have two "legislative bodies," the electors of the whole state and the representatives of the electors in the legislature. There is no feature of the initiative and referendum in it. If Judge Sherwood had directed his batteries at these attempted revolutionary additions to the initiative and referendum he would have carried all before him with flying colors.

In order to answer the question, will the initiative and referendum destroy or supplant the "republican form" of government, it is necessary to consider the effect of it in operation. Upon this question I cannot do better better than to quote again from Mr. Shibley, who says:

"That the people's right to veto bills and directly initiate is effective without actually putting measures to a direct ballot is shown also in Switzerland. The optional referendum has existed for twenty-nine years in federal Switzerland. During the years 1875 to 1898, inclusive, there was eleven years in which not a bill was ordered to a direct ballot. In the thirteen years in which the optional referendum was used there were only twenty-five laws ordered to a direct vote. This is the optional referendum in federal Switzerland. The direct initiative has existed since 1891 and only three bills were initiated in the seven years, 1891-1898. In the canton (state) of Zurich, Switzerland, the direct initiative has existed for twenty-four years and the people have initiated only twenty-one bills, of which only five became law. Two of the competing bills framed by the legislature became law. The mere existence, then, of a people's veto and direct initiative is effective. It results in a system of government in which

the people freely choose their representatives, who, after election are no longer tempted to betray the interests of their constituents, the constituents possess the final power through a veto and direct initiative. The effect on the representatives is far-reaching. * * * There is weeded out: Those who would hold office because they are nominated and elected by the special interests. Those who hold office for what they can get by selling their vote, directly or indirectly."

The conclusion seems irresistible that the initiative and referendum, correctly understood and applied will support, strengthen, and enlarge representative government, not destroy nor supplant it. It will likewise purify the legislative body and weaken if not sweep entirely away, the corrupting lobby.[4]

WILLIS L. HAND.

Kearney, Nebraska.

[4] *An Oregon Decision Later:* On December 21 1903, and since the foregonig was written, the Oregon Supreme Court has passed upon the main question considered by the writer in the recent case of Kadderly v. City of Portland, 74 Pac. Rep. 710. We extract the following from the opinion of the court: "Nor do we think the amendment void because in conflict with section 4, article 4, of the constitution of the United States, guaranteeing to every state a republican form of government. The purpose of this provision of the constitution is to protect the people of the several states against aristrocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government: Cooley, Const. Lim. (7th ed.) 45; 2 Story, Const. (5th ed.) p. 1815. But it does not forbid them from amending or changing their constitution in any way they see fit so long as none of these results are accomplished. No particular style of government is designated in the constitution as republican, nor is the exact form in any way prescribed. A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holdin; their offices during pleasure, for a limited period, or during good behavior:' The Federalist, 302. And, in discussing the section of the constitution of the United States now under consideration, he says: 'But the authority extends no further than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, however, as the existing republican forms are continued by the states, they are guaranted by the federal constitution. Whenever the states may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is that they shall not exchange republican for anti-republican constitutions.' *Id.*, 342. Now the initiative and referendum amendment does not abolish or destroy the republican form of government, or substitute another in its place. The representative character of the government still remains. The people have simply reserved to themselves a larger share of legislative power, but they not overthrown the republican form of government, or substituted another in its place. The government is still divided into the legislative, executive and judicial departments, the duties of which are discharged by representatives selected by the people. Under this amendment, it is true, the people may exercise a legislative power, and may, in effect, veto or defeat bills passed and approved by the legislature and the governor; but the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed. Laws proposed and enacted by the people under the initiative clause of the amendment are subject to the same constitutional limitations as other statutes, and may be amended or repealed by the legislature at will. The veto power of the governor is not abridged in any way, except as to such laws as the legislature may refer to the people. The provisions of the amendment that 'the veto power of the governor shall not extend to measures referred to the people' must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition. The governor is required under the constitution to exercise his veto power, if at all, within five days after the act shall have been presented to him, unless the general adjournment of the legislature shall prevent its return within that time, in which case he shall exercise the right within five days after the adjournment. He must necessarily act, therefore, before the time expires within which a referendum by petition on any act of the legislature may be invoked, and before it can be known whether it will be invoked or not. Unless, therefore, he has a right to veto any act submitted to him except such as the legislature may specially refer to the people, one of the safeguards against hasty or ill advised legislation which is everywhere regarded as essential is removed—a result manifestly not contemplated by the amendment.'

HUSBAND'S INTEREST IN WIFE'S PROPERTY UNDER MISSOURI LAW.

The right of married women to own property, real and personal, as equitable separate property, not subject to the ownership or control of their husbands, nor liable to be subjected to the payment of the debts of such husbands has always been upheld by the courts of the state.[1] And, at least since 1870, to hold such property without the intervention of a trustee.[2] Where in case of personal property, a trustee has seemed necessary the courts have regarded and treated the husband as his wife's trustee.[3] He will also be regarded as her trustee as to real estate conveyed

[1] Coats v. Robinson, 10 Mo. 757; Clark v. McGuire, 16 Mo. 302; Whitesides v. Cannon, 23 Mo. 451; Botts v. Gooch, 97 Mo. 88; Metropolitan Bank v. Taylor, 53 Mo. 444; Burnley v. Thomas, 63 Mo. 390.

[2] Schafroth v. Ambs, 46 Mo. 114; Tennison v. Tennison, 46 Mo. 77; Richardson v. DeGiverville, 107 Mo. 422; Hammons v. Renfrow, 84 Mo. 332.

[3] Tennison v. Tennison, 46 Mo. 77; Hammons v. Renfrow, 84 Mo. 332.

by him, directly, to her for her sole and separate use.[4] And as to such real estate, purchased with her separate means, the title to which is taken in his name, he will be held as holding the legal title in trust for the wife's separate use and benefit.[5] In the real estate of the wife held as her equitable separate property, while from the very nature and object of such estate the husband is excluded from all marital rights therein during her life, he has an estate by the curtesy, where the wife's estate is one of inheritance and the other requisites of curtesy exist; unless a plain intention to debar the husband from curtesy, is shown by the instrument creating such separate estate.[6] This estate will become operative in the husband only, at the death of the wife; but she cannot deprive him of it by deed or will.[7] But where the plain intention to exclude the husband from all marital rights in said estate is shown by the instrument creating it, curtesy will not attach.[8] A conveyance to a wife "for her sole, separate use and behalf, free from the interference, debts, liabilities and curtesy of her husband" will exclude curtesy.[9] As will the words, "To her sole and separate use, free and clear of all marital rights of her present or any future husband she may hereafter have."[10] But the following language of such instrument, viz.: "Shall be owned and held by her to her own separate and exclusive use and benefit, separate and apart from her intended husband, unaffected by said intended marriage and not subject to his debts or liabilities, with absolute freedom and power on her part to use or otherwise dispose thereof, during coverture as she may deem fit, and at her death to make such disposition of the same by last will or testamentary appointment as she may deem proper," is held not to show such intention.[11] The wife can make a valid conveyance of real estate in which she has an equitable separate estate without the joinder of her husband the conveyance being subject to his curtesy, if any he has.[12]

The common law doctrine of the rights of the husband in the real and personal estate of the wife, held by ordinary legal title, was, prior to the enactment of the various married women's laws, in full force in this state.[13] The earliest one of these laws now on the statute books was passed in 1865, and is now embodied in its original form in sec. 4339, Rev. Stat. 1899. Under this section no real estate of the wife, not even the husband's interest therein, can be taken for the payment of his debts.[14] And the rents, issues and products of such real estate, for the payment of no other of the husband's debts than such as "were created for labor or material for the cultivation or improvement of such real estate, or for necessaries for the wife or family of such husband," whether contracted before the statute went into effect or after.[15] But the property thus left liable for such debts could be taken in execution on a judgment against the husband alone, therefor.[16] A deed to the wife's lands made by the husband alone after that law went into effect does not convey even his own interest therein, though the marriage existed and the lands were owned by the wife before.[17] But the law did not operate to deprive the husband of his right to the possession and control of the wife's real estate, nor the enjoyment and use of the issues, rents and products thereof, in himself and the husband could still sue alone for the possession of such real estate, and was the only necessary party to the suit.[18]

The statute of 1875, making married women's personal property and the proceeds thereof, together with her separate earnings, and money for any violation of her personal rights separate estate (Rev. Stat. 1899, sec. 4340), is prospective only, and does not divest the husband of any vested interest in the wife's personal property, that he had when the statute went into effect; nor debar his creditors from the right to subject such interest to the payment of their claims.[19] The right of the husband to reduce the wife's choses in action to possession during the coverture, and that of his creditors to subject them to the payment of his debts, existing when the statute went into effect were vested rights, and not taken away by it.[20] But all personal property coming into the ownership of the wife after the statute took effect is separate estate, though

[4] Woodworth v. Tanner, 94 Mo. 124; Walsh v. Chambers, 13 Mo. App. 301.

[5] Cox v. Cox, 91 Mo. 71; Alkire Grocery Company v. Ballinger, 137 Mo. 369.

[6] Tremmel v. Kielboldt, 75 Mo. 255; Soltan v. Soltan, 93 Mo. 307; Miller v. Quick, 156 Mo. 495; Kennedy v. Koopman, 166 Mo. 87.

[7] Rev. Stat. 1899, sec. 4603; Soltan v. Soltan, 93 Mo. 307; Kennedy v. Koopman, 166 Mo. 87.

[8] McTigue v. McTigue, 116 Mo. 138; McBreen v. McBreen, 154 Mo. 323.

[9] McTigue v. McTigue, 116 Mo. 138.

[10] McBreen v. McBreen, 154 Mo. 323.

[11] Kennedy v. Koopman, 166 Mo. 87.

[12] Turner v. Shaw, 96 Mo. 22; Cadematori v. Gauger, 160 Mo. 352; Small v. Field, 102 Mo. 104; Kennedy v. Koopman, 166 Mo. 87.

[13] Rev. Stat. 1899, sec. 4151; Dyer v. Wittler, 89 Mo. 81; Conrad v. Howard, 89 Mo. 217.

[14] Clark v. Rynex, 53 Mo. 380; Mueller v. Kaussman, 84 Mo. 318, 325; Ball v. Woolfolk, 75 S. W. Rep. 410.

[15] Meyers v. Gale, 45 Mo. 416.

[16] Alexander v. Lydick, 80 Mo. 341.

[17] Wannell v. Kem, 51 Mo. 150; Silvey v. Sumner, 61 Mo. 253; Bartlett v. O'Donoghue, 72 Mo. 563; Mueller v. Kaussman, 84 Mo. 318; Craig v. Van Bibber, 100 Mo. 584.

[18] Cooper v. Ord, 60 Mo. 420; Gray v. Dryden, 79 Mo. 106; Peck v. Lockridge, 89 Mo. 549; Arnold v. Willis, 128 Mo. 145.

[19] Hart v. Leete, 104 Mo. 315; State Bank v. Leete, 115 Mo. 184; State Bank v. Leete, 141 Mo. 570.

[20] State Bank v. Leete, 115 Mo. 184; State Bank v. Leete, 141 Mo. 570.

the marriage existed prior thereto.[21] The proceeds of the sale of lands held by the wife by ordinary legal title, made after the statute went into effect are her separate property, which the husband cannot reduce to his possession without her assent in writing.[22] As are the rents, issues and products of such real estate, and money arising from their sale.[23] And where without the wife's assent in writing, the husband invests her statutory separate personal property in real estate, taking the title in his own name, such real estate will be equitable separate property of the wife, and the husband, her trustee holding the legal title thereto for her.[24] The mere blank indorsement by the wife to her husband, of a note payable to her, is not such an assent to his reduction of the same to his possession as is required by the statute.[25] Though the wife under this statute has separate property in the wages of her separate labor, and damages for the violation of her personal rights, and under the amendment thereto of 1883 can sue alone therefor,[26] the husband still has a right of action for the loss of the wife's services caused by personal injuries to her, and the expenses he has been caused thereby.[27] The wife can not in her action for damages recover such expenses unless she has paid them or they have been charged to her.[28] The amendment of 1889, to section (now 4340 Rev. Stat. 1899), making a married woman's real estate equally with her personal property, separate estate, is also prospective only, and did not divest the husband of any marital right in property owned by the wife at the time the law went into effect.[29] And thereafter the husband was still the proper, and only necessary party plaintiff in a suit for the possession of such lands as the wife owned before the statute took effect.[30] Though the husband by the terms of the statute is excluded from all interest in and power over the subsequently acquired real estate of the wife during her life-time.[31] He still has curtesy after her death, in her real estate of inheritance, where there is a child born alive during the coverture capable of inheriting the estate as heir of the wife; of which she cannot deprive him by deed or will.[32] But the wife may make a valid conveyance of the real estate made her separate property by the statute without the joinder of her husband subject to the husband's estate by the curtesy contingent upon his surviving her.[33] The estate by the curtesy is barred by an absolute divorce though granted to the husband for the fault of the wife.[34] Under the decisions of the courts construing sections 4335 and 4340, Rev. Stat. 1899, there seems to be no difference now between the husband and wife's respective interests in and power over her separate statutory real estate, and such of her equitable separate real estate as is subject to the husband's curtesy.[35] By a statute enacted in 1895 it is provided that "When the wife shall die without any child, or other descendants capable of inheriting, her widower shall be entitled to one half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."[36] There have been no decisions construing this section. Its purpose probably was to make a provision for the husband out of the wife's estate, in cases where he was not entitled to curtesy at common law. But that estate may exist in the husband in cases to which the statute in terms applies, as where there has been a child born alive of the marriage or who has since died, leaving no descendants. Where such a state of facts exists, the question arises, does the husband have a double estate—his common law estate of curtesy and also the estate given him by the statute? For there is no provision made for the election by the widower, between different estates, as there is by the widow.

It will scarcely be held that the common law estate of curtesy is abolished in cases to which the statute applies, as repeals by implication are not favored by the courts.[37] There is no presumption that a change in the common law is intended by a statute unless the statute is clear and explicit in that direction,[38] and covers the

[21] Winn v. Riley, 151 Mo. 61; Glaves v. Wood, 87 Mo. App. 82.

[22] Rodgers v. Bank, 69 Mo. 560.

[23] Brown v. Brown, 124 Mo. 79.

[24] Broughton v. Brand, 94 Mo. 169; Seay v. House, 123 Mo. 450; Owings v. Wiggins, 133 Mo. 630; Alkire Grocery Company v. Ballinger, 137 Mo. 369.

[25] James v. Groff, 157 Mo. 402; Winn v. Riley, 151 Mo. 61; Hurt v. Cook, 151 Mo. 416.

[26] Rev. Stat. 1899, sec. 4340; Smith v. C. A. Ry. Co., 119 Mo. 246; Wallis v. Westport, 82 Mo. App. 522; Hickey v. Welsh, 91 Mo. App. 4.

[27] Wallis v. Westport, 82 Mo. App. 522; Cullar v. K. & T. Ry. Co., 84 Mo. App. 340.

[28] Rogers v. Wolfe, 104 Mo. 1; Reed v. Crissy, 63 Mo. App. 114; McLean v. Kansas City, 81 Mo. App. 72.

[29] Arnold v. Willis, 128 Mo. 145; Clay v. Mayr, 144 Mo. 376; Robards v. Murphy, 64 Mo. App. ——; Smith v. White, 165 Mo. 590; Vanata v. Johnson, 170 Mo. 269; Gladney v. Snyder, 172 Mo. 318; Proper v. Proper, 171 Mo. 407.

[30] Arnold v. Willis, 128 Mo. 145; Vanata v. Johnson, 170 Mo. 269; Dyer v. Wittler, 89 Mo. 81; Smith v. White, 165 Mo. 590; Gladney v. Snyder, 172 Mo. 318.

[31] Rev. Stat. 1899, sec. 4340; Reed v. Painter, 145 Mo 341; Woodward v. Woodward, 148 Mo. 241.

[32] Rev. Stat. 1899, sec. 4003; Woodward v. Woodward, 148 Mo. 241; Kennedy v. Koopman, 166 Mo. 87.

[33] Rev. Stat. 1899, sec. 4335; Farmers' Bank v. Hageluken, 165 Mo. 443; Kennedy v. Koopman, 166 Mo. 87.

[34] Doyle v. Rowling, 165 Mo. 231.

[35] Woodward v. Woodward, 148 Mo. 241; Farmers' Bank v. Hageluken, 165 Mo. 443; Kennedy v. Koopman, 166 Mo. 87.

[36] Rev. Stat. 1899, sec. 2938.

[37] Young v. K. C. St. J. & C. R. Co., 33 Mo. App. 509; Boone County & C. Ins. Co. v. Anthony, 68 Mo. App. 424; State v. Walbridge, 119 Mo. 383; State v. Slover, 134 Mo. 10.

[38] 1 Kent Commentaries, 3d ed. 463; White v.

whole subject matter.[39] Our courts hold that there are three ways in which the common law or a statute may be repealed: first, by a repealing clause; second, by such repugnance that the two laws may not in reason stand, and third, by a revision of the whole former law which is evidently intended as a substitute for it.[40] Neither of these requisites to the repeal of the common law governing curtesy is present in the section referred to. There is also another species of interest of the husband in the property of his wife, in that the annual products of her real estate "may be attached or levied upon for any debt of the husband created for necessaries for the wife or family of such husband, and for debts for labor or materials furnished upon or for the cultivation or improvement of such real estate,"[41] and that her personal property may be levied upon for a debt of the husband created for necessaries for the wife or family. "Provided that before any such execution shall be levied upon any separate estate of a married woman she shall be made a party to the action, and all questions involved shall have been therein determined and shall be recited in the judgment and execution thereon."[42] The provision requiring the wife to be made a party to the proceeding, applies to both sections 4339 and 4340.[43] Real estate of the wife cannot be subjected to the payment of any of the husband's sole debts.[44] And before any of her property can be subjected to the payment of such of his debts as it is made liable for under these sections the wife must be made a party to the suit, to obtain judgment upon the debt, and all questions involved therein determined and recited in the judgment and execution thereon; the property sought to be subjected must have been owned by the wife when the debt was contracted, and still be in existence when the action is begun; the petition must describe the property, and the consideration for the debt must be recited in the petition, judgment and execution.[45]

Kansas City, Mo. JOHN T. MARSHALL.

Wager, 25 N. Y. 328; People v. Palmer, 109 N. Y. 110, 4 Am. St. Rep. 423.

[39] State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163.

[40] Young v. Kansas City, St. J. & C. B. Ry. Co., 33 Mo. App. 509; Boone County & C. Ins. Co. v. Anthony, 68 Mo. App. 424.

[41] Rev. Stat. 1899, sec. 4339.

[42] Rev. Stat. 1899, sec. 4340.

[43] Megraw v. Woods, 93 Mo. App. 647.

[44] Harned v. Shores, 75 Mo. App. 500; Megraw v. Woods, 93 Mo. App. 647.

[45] Latimer v. Newman, 69 Mo. App. 76; Harned v. Shores, 75 Mo. App. 500; Megraw v. Woods, 93 Mo. App. 647.

EVIDENCE—ADMISSIBILITY OF TELEPHONIC CONVERSATIONS.

YOUNG v. SEATTLE TRANSFER CO.

Supreme Court of Washington, November 10, 1903.

Where, in an action against a warehouseman for loss of a trunk, there was no proof that defendant ever received the trunk, except that plaintiff's agent called for defendant's number over a telephone on two occasions, and asked that they come for and store the trunk for plaintiff, and that thereafter an expressman took the trunk away from plaintiff's previous residence, but there was no evidence to identify the person who answered the telephone or the person who took the trunk as defendant's employee, the evidence was insufficient to show that defendant had ever received the trunk into its possession.

PER CURIAM: This was an action begun in the superior court of King county by respondent, J. W. Young, for the recovery of the value of a trunk and contents alleged to have been stored in the month of August, 1898, with appellant, Seattle Transfer Company. The answer was a general denial, except as to the incorporation of appellant, the character of its business, and the demand for the trunk. The cause was tried to a jury in the superior court, a verdict was rendered in favor of respondent against appellant for $240, and judgment was entered on the verdict for that amount and costs, from which it appeals to this court.

At the trial, after respondent rested, appellant moved for a nonsuit, which was denied. Appellant thereupon submitted its evidence, and after the rendition of the verdict moved the court for a new trial, which was overruled. Appellant excepted to each ruling in denying its request for a nonsuit and its motion for a new trial. The assignment of error presents the sole question in the case, was there evidence to support the verdict of the jury? Under the issues, as formulated by the pleadings, the burden of proof was cast upon respondent to show by some testimony that the Seattle Transfer Company undertook to receive and place in storage for a consideration in one of its warehouses at the city of Seattle respondent's trunk and contents, and that in pursuance of such agreement appellant did receive said goods for that purpose. The evidence bearing on these propositions, adduced at the trial on behalf of respondent and appellant, may be summarized as follows: Respondent and one Ramsay, in February, 1898, jointly occupied a room at the Yesler residence in Seattle. Respondent, intending to go to Alaska, placed certain of his wearing apparel in said trunk, then in the Yesler residence, in the custody of Mr. Ramsay, to remain in the room they were jointly occupying until Mr. Ramsay should desire to move from said place, in which event he was instructed by respondent to store the trunk with appellant company; that some time during the month of August, 1898, Ramsay, intending to remove from the Yesler residence, attempted to communicate with the appellant about the storage of the trunk

on two different occasions. At the trial the circumstances regarding such communications were related by Ramsay in his direct examination in the following language: "I rang up the Seattle Transfer Company, and told them to send up and get Mr. Young's trunk at the Yesler home, where we were rooming, and take it down, and put it in storage for Mr. Young; and somehow they didn't send up for the trunk that day, so when I went back to my room that night I found the trunk hadn't been sent for; so the following day I telephoned again to the Seattle Transfer Company, and told them I would like for them to send up and get that trunk right away; that I wanted to move and would like for them to take care of it; and they said they would send a man up to attend to it that day, so when I went back home that evening I found the trunk had been called for and taken away." This witness also testified in this connection, in response to questions propounded by respondent's counsel, in the following manner: "Q. You don't know, of course, who it was at the other end of the line that you were talking to? A. No, I do not. Q. How did you— Just explain to the jury what you did, now, about reaching the office of the Seattle Transfer Company. A. Well, I did in that case the same as I would do in any other—just simply looked up the number in the directory, and rang up and inquired if that was the Seattle Transfer Company. Q. What reply did you get? A. They replied it was. So then I requested them to send up and get the trunk." Ramsay, on cross-examination, testified that he telephoned from Newhall's store down town in Seattle each time; that he did not recognize the voice of the person addressed at either time; that he did not recollect the number of the telephone he called up, and did not know who took the trunk away from the house. Mrs. Emma Gagle, who lived at the Yesler residence at that time, testified: "I know that the trunk was taken from the Yesler residence. I don't know the party's name who took it, but I do know it was an expressman. I don't know where the trunk was taken." No check or receipt for the trunk was ever asked for or received by Ramsay or Mrs. Gagle from the appellant or expressman who removed the trunk. The respondent at that time was in Alaska. In the spring of the year 1900 Young wrote Ramsay from Alaska, requesting him to go to the transfer company and get his trunk, pay the storage charges, and send it to him. Ramsay, pursuant to such request, went to the office of appellant, and after diligent search the company was unable to find any trace of the trunk or its contents, either by consulting its books or by searching through its warehouse. Respondent testified that he left Seattle for Alaska in February, 1898, corrobated Mr. Ramsay with regard to leaving the trunk and contents with him, and authorizing him to store same with appellant; and testified, further, that he never at any time saw the trunk in the possession of the transfer company; that he personally had had no agreement with the company concerning the trunk, but had left the matter in Ramsay's hands; that on his return from Alaska he went to the office of appellant, and had a conversation concerning the trunk with Mr. Shaubut, in charge of the baggage department of the transfer company. Respondent testified: "We went down into the storage room to see if witness could pick out the trunk, and were unable to find it. Mr. Shaubut claimed that the company did not have it." The date of this conversation and search was not definitely fixed by Mr. Young, but Mr. Shaubut, testifying on behalf of appellant, said it was about one year prior to the trial of the cause, thereby fixing the date about June 12, 1901. On behalf of appellant, the testimony tended to show that no record was ever made with reference to the trunk; that thorough search was had, and no trace of it or its contents could be found; that the company in the month of August, 1898 did an extensive storage and transfer business; that mistakes had sometimes occurred in handling merchandise; that the three witnesses examined on behalf of appellant, who were at that time agents and officers of the transfer company, had no knowledge or recollection of the communications over the telephone alleged to have been made by Ramsay, witness Shepherd testifying that in the month of August, 1898, he was clerk in the office of appellant company, that it was his business to receive orders communicated over the telephone, and that while he happened to be out of the office attending to the company's affairs some one else might answer calls at the telephone.

The appellent contends that the evidence produced at the trial failed to show that the trunk and contents in question ever came into the possession of the Seattle Transfer Company by virtue of any contract or arrangement made or had with respondent or in any other manner. The *onus probandi* was upon respondent at the trial as to the issues tendered by him, above noted. The jury, having rendered a verdict in respondent's favor, must necessarily have found that the trunk and contents came into appellant's possession by virtue of some contractual relation entered into between some agent of appellant and Mr. Ramsay, representing the respondent. Verdicts of juries as well as findings of courts, in determining questions of fact, must be based upon testimony. Reidhead v. Skagit County (Wash.), 73 Pac. Rep. 1118. Communications, when material to the issues, through the medium of the telephone, may be shown in the same manner and with like effect as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party for that matter, be recognized by the other in such conversations, but the identity

of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons in response to calls at the telephone from their offices or places of business concerning their affairs opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle in ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line. The able counsel for respondent argue that the case at bar presents the question as to the weight of evidence; that, the jury having found in respondent's favor on these issues, the court will not interfere.

On that branch of the case relating to communications over the telephone as evidence our attention is directed to volume 25, Am. & Eng. Ency. of Law (1st Ed.) p. 885, where the following language is used: "There may be cases, however, in which the fact that the voice is not recognizable, and that neither party can be absolutely sure of the identity of the person conversing with him, may necessitate the application of exceptional rules." Several cases are cited in the foot-note in support of this proposition. Wolfe v. The Missouri Pacific Ry. Co., 97 Mo. 473, 11 S. W. Rep. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, was an action brought by plaintiffs (respondents) against the company (appellant) to recover damages for breach of a contract for the carriage and delivery of merchandise. At page 477, 97 Mo., and page 50, 11 S. W. Rep., 3 L. R. A. 539, 10 Am. St. Rep. 331, Barclay, J., delivering the opinion of the court, observes: "In the progress of the trial the court admitted testimony of alleged conversations by telephone connected with plaintiffs' office, though the witness did not identify the voice he heard at their instrument." The opinion states subsequently that there was ample testimony to support the finding of the trial court, and that its instructions were correct. Then proceeds to remark: "A question arose incidentally at the trial upon the admission in evidence, of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness." It is significant that the subject-matter of the conversation is not discussed by the court. The language, in connection with facts of the case as shown by the decision, would imply that the alleged communication was not very material to the issues. As the court remarked further on: "The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission."

In the controversy at bar appellant does not question the admissibility of Ramsay's alleged conversations over the telephone with reference to the trunk, but contends that they fail to connect appellant with the transaction.

The case of Globe Printing Co. v. Stahl, 23 Mo. App. 451, bears more directly on the propositions discussed by the respective counsel in the case at bar. The action was brought by the printing company (respondent) against Stahl (appellant) for the purpose of collecting a debt. The facts appear in the opinion of the court at page 452, and are thus stated: "The sole question which arises upon the record is whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's bookkeeper and a person who answered to the defendant's name. The bookkeeper testified that he called up by telephone to the general office of the Bell Telephone Company for defendant's number, and was, by the central office, connected therewith; that the list of the telephone showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery stable on Olive street; that witness was not certain which number he called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendant's number to the telephone call; that he (the witness) did not know whose voice it was, and does not now know; that the witness did not know the defendant's voice, and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant,) and the answer was 'Yes.' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, that he asked why defendant did not pay the bill for which this suit was brought, and that the party answering said, 'All right; I will attend to the matter about the first of the month.' A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified." The court ruled that the testimony was admissible. In that case it appeared that the bookkeeper of respondent identified Stahl by first inquiring if it were he who answered the call at the telephone. Receiving an affirmative response, he talked with Stahl about the debt for which suit was brought though Stahl's voice was not recognized. Still it should be borne in mind that the alleged conversation related to prior dealings had between the parties to the litigation. It further appears that a previous witness had testified to a conversation had with Stahl over the telephone, who recognized the voice. The court very properly held that the testimony was admissible. While it appears in the case at bar that neither respondent nor Mr. Ramsay had any previous dealings with the appellant concerning the trunk in question, Ramsay did not on either of the occasions named make any effort to identify the

party or parties. The facts in the other cases cited by the author were so dissimilar to those presented in this controversy we deem it unnecessary to comment upon them. The respondent offered no evidence to supply "the missing link" in that regard. The jury was permitted to guess and base its findings thereon, that some agent or employee of the appellant answered witness Ramsay's communications, or at least one of them; that in pursuance thereof an employee of the transfer company, who was unknown and unidentified by the testimony, called and removed the trunk from the Yesler residence. This is not a question as to the weight of evidence, but one of failure of proof on material issues tendered by respondent and denied by appellant. A verdict based on such considerations cannot stand. We are therefore of the opinion that the trial court erred in denying appellant's motions for a nonsuit and for a new trial, that the verdict of the jury was not sustained by the evidence, that the judgment of the superior court should be rereversed, and the case remanded, with directions to dismiss the action; and it is so ordered.

NOTE.—*Weight and Admissibility of Telephone Communications.*—In the judgment of the writer of this annotation, the court's decision in the principal case has introduced a more dangerous precedent in the law than the one it feared to introduce by deciding the case the other way. It will also serve to discourage the use of a most convenient means of business communication.

The telephone has passed from the category of business luxuries to that of business necessities, and it is to-day being used for the negotiation and consummation of the most important contracts and the most serious transactions in business life. It comes, therefore almost like a shock to the business man, to tell him, as the court does in the principal case, that if he relies on a communication of that character he "takes the risk of establishing the identity of the person conversing with him at the other end of the line." To the business man this rule is a ridiculous limitation on his use of a great business convenience. How seldom does one recognize a voice over the telephone, or even if he did think he recognized could say he was sure of it unless it be the voice of a personal friend or unless the voice has some prominent peculiarity. A business man generally and quite reasonably considers that he has met all the requirements of the case when he calls up the correct telephone number and the party answering admits his identity or the identity of his principal. That this also meets all the requirements of the law is admitted by all the courts that have passed upon this question, and even by the court in the principal case so far as the admissibility of the conversation goes. The court in the principal case, however, nullifies the effect of the rule by holding that after a telephonic communication is admitted as competent evidence it can be rendered of *no effect* by the fiat of the court, if the party introducing the evidence fails to prove the identity of the parties otherwise than by admissions of the party addressed at the time the message was communicated. We think the cases will clearly show that the question of the weight and sufficiency of the communication and whether it has been properly connected with the party against whom it is introduced is for the jury.

It is of course recognized everywhere that telephone conversations are not in their nature incompetent Lippitt v. Provision Co., 57 N. Y. Supp. 747; Murphy v. Jack, 142 N. Y. 215, 36 N. E. Rep. 882. It is well settled by authority that the witness' failure to remember the name of the party with whom he conversed affects only the weight of the evidence and not its competency. Missouri Pacific R. R. Co. v. Heidenheimer, 82 Tex. 195; People v. Ward, 3 N. Y. Crim. Rep. 511; Rock Island, etc., R. R. v. Potter, 36 Ill. App. 590. *Contra:* Brewing Co. v. Adams, 36 Ill. App. 540. It is also held by the weight of authority that the fact that the witness does not recognize the voice of the speaker with whom he was conversing over the telephone, does not affect the admissibility of the evidence but goes only to its weight and effect with the jury. Wolfe v. Railroad, 97 Mo. 473, 10 Am. St. Rep. 331; Globe Printing Co. v. Stahl, 23 Mo. App. 451; Guest v. Railroad, 77 Mo. App. 258; Thompson on Electricity, §§ 124-125. In Wolfe v. Railroad, *supra*, the court said: "When a person places himself in connection with the telephone system, through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible."

Information received over the telephone which is to be used as the basis of an affidavit for an attachment, or as a ground for a criminal prosecution, has been held to be admissible for that purpose, provided the person making the affidavit or swearing out the indictment knew the voice of the party conveying the information. Murphy v. Jack, 142 N. Y. 215; People v. Ward, 3 N. Y. Crim. Rep. 483; Stepp v. State, 31 Tex. Crim. Rep. 349, 20 S. W. Rep. 753. So also wherever a statute of the state requires that all notices shall be "in writing," a notice by telephone is of course insufficient. *In re* Shiers' Estate, 35 S. Car. 417, 14 S. E. Rep. 931. As to the validity of acknowledgments taken through a telephone, that question has been settled by a California case, in which it was held that the certificate of a notary in due form of law was conclusive in the absence of fraud, duress, accident or mistake, and the deed was upheld. Banning v. Banning, 80 Cal. 271. There is a further question that has arisen. Suppose two parties talk over the telephone with the assistance of the operator; that is, suppose A telephones B, and in carrying on the conversation A speaks to the operator, C, who in turn transmits the message to B. The latter then conveys his reply to the operator, C, who passes it on to A. And thus the conversation proceeds. It has been held that a conversation thus carried on is admissible on the ground of agency, the operator being considered as the agent of both parties in carrying on the conversation. Sullivan v. Kuykendall, 82 Ky. 483, 56 Am. Rep. 901; Oskamp v. Gadsden, 35 Neb. 7, 52 N. W. Rep. 718. But see Wilson v. Coleman, 81 Ga. 297. It has been held, also, that it is not error to permit a bystander in a telephone office to testify to the part heard by him of a conversation by telephone, where such conversation has been shown *aliunde* to have been between parties to a suit, and upon the subject-matter thereof.

We were very much pleased, in our researches on this question, to come upon an early annotation on this question in 17 L. R. A. 440, in which the annotator, after noting that the decisions were few, said:

"The result of the comparatively few decisions yet reported on this question, may be safely said to be in favor of the admissibility of telephone conversations, not only when the voice of the other party is recognized, but even when it is not, provided the conversation takes place in the usual course of business, with one regularly placed in connection with the witness in accordance with the telephone usages on a call for the other party."

JETSAM AND FLOTSAM.

REFORM IN JUSTICE COURTS.

Mr. C. E. Kremer, of the Chicago Bar, member of the Executive Committee of the Bureau of Justice, at its annual meeting, said:

"There should be a law, doing away with the civil justice courts and their abuses by establishing municipal courts at Chicago avenue, at Halsted street, at Twelfth street. The fee system should be done away with and responsible lawyers be placed on the bench as judges with salaries.

The office of chief constable should be made and he should be provided with salaried deputies. The constable would then have no reason to nurse his business.

The abuses of the constable are almost as great as the evils of the justice shops. The constable has become an object of contempt."

Illinois is not alone in its trouble. At a banquet given in honor to the Nestors of Summit County Bar, at Akron, Ohio, Mr. W. A. Spencer spoke of the poor-men's court as follows:

"Five years ago I was guilty of being a candidate for Justice of the Peace. I was defeated by 25 votes. I know more, now, and I congratulate myself I was not successful. Maybe those 25 votes are represented here this evening. If so, I want to thank you. Justice courts first came into being in the time of Edward I. of England. They were called ministerial tribunals and were presided over by men of ability and character. Their powers have been enlarged and the qualifications of the justices have been removed. There is such a thing as justice and then there is justice's justice. Many efforts have been made to abolish these courts but courts have decided that they are here to stay and the justices are monarchs of all they survey. One of the kings of England was thus reproached, and the words apply to-day: 'Thou hast appointed justices of the peace to call poor men before them to testify about that of which they know nothing.' These courts are called the poor men's curse. The justice laughs in your face and picks your pocket. Shakespeare knew something of these courts, for he puts into the mouth of King Lear these words: 'A man may know what is going on in this world without ears.' I favor putting all justices on salary. The present law encourages dishonesty. I hope these courts may become in reality courts of justice, having that virtue of soul, distributing to each one as he deserves."

HUMOR OF THE LAW.

"Now, Mr. Breeves," asked the chairman of the investigating committee, "is it not true that you took the case of Jones v. Brown on a contingent fee—that you agreed to accept a part of the amount recovered as your fee?"

"It is not true," replied the lawyer. "I stipulated that I should have all of it and $500 besides."

"Gentlemen," said the chairman, "I fail to see where Mr. Brown has been guilty of unprofessional conduct."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ALIENS—Status of Foreign-Born Child.—Under Rev. St. U. S. § 2172 [U. S. Comp. St. 1901, p. 1334], the naturalization of the father of a foreign-born minor held to change the status of the child.—Rexroth v. Schein, Ill., 69 N. E. Rep. 240.

2. APPEAL AND ERROR—Failure to Assign Ruling as Error.—A ruling of the court, not assigned as a cause for new trial, is not before the supreme court for review.—Nesbitt v. Stevens, Ind., 69 N. E. Rep. 256.

3. APPEAL AND ERROR—Pleading.—A plea that a surety "did not guaranty" work, if construed as averring that the secured contract did not contain the guaranty, held properly excluded, where that issue was raised by other pleas.—United States Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil, Ala., 35 So. Rep. 344.

4. APPEAL AND ERROR—Questions Reviewable.—Where an appeal is taken on the judgment roll alone, no question can arise as to the sufficiency of the evidence.—Alexander v. Welcker, Cal., 74 Pac. Rep. 845.

5. APPEAL AND ERROR—Remittur.—A remittur held not to correct a judgment erroneously allowing damages. Remand, with direction to nonsuit on the claim, is the proper practice.—Benton v. Hopkins, Colo., 74 Pac. Rep. 891.

6. ASSIGNMENT OF ERROR—Dismissal of Writ.—A plaintiff in error held entitled to dismiss his writ, as against a defendant in error who had assigned cross-errors.—Fahey v. Fahey, Colo., 74 Pac. Rep 884.

7. ATTACHMENT—Where Judgment is for Less than Claimed in Affidavit.—That plaintiff fails to recover judgment for the full amount claimed in his affidavit for an attachment held not to authorize a discharge of the attachment.—Finney v. Moore, Idaho, 74 Pac. Rep. 866.

8. BANKRUPTCY—Subsequent Promise to Pay.—The fact that one discharged in bankruptcy has conditionally promised to pay a debt included in the discharge cannot prevent a recovery on a clear promise to pay.—Brooks v. Paine, Ky., 77 S. W. Rep. 190.

9. BANKS AND BANKING—Liability for Unauthorized Payments.—Bank held to assume risk of authority in correspondent of depositor to withdraw money.—Heath v. New Bedford Safe Deposit & Trust Co., Mass., 69 N. E. Rep. 215.

10. BENEFIT SOCIETIES—Insanity Existing Prior to Admission.—Where the laws of a benefit society do not clearly authorize jurisdiction to try an insane member on a notice deposited in the postoffice, his expulsion on such notice is not a defense to an action by the beneficiary on a policy of insurance.—Dubcich v. Grand Lodge, A. O. U. W., Wash., 74 Pac. Rep. 832.

11. BILLS AND NOTES—Ratification.—An action may be maintained against a corporation directly on a note given by it, originally invalid, but subsequently validated by the conduct of the corporation.—Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., Cal., 74 Pac. Rep. 851.

12. BONDS—Money at Interest.—A bond is an interest-bearing obligation to pay money, and in the hands of a purchaser represents money at interest.—Sweetsir v Chandler, Me., 56 Atl. Rep. 584.

13. BOUNDARIES—Riparian Rights.—A riparian proprietor on a navigable stream has absolute title to the line of ordinary high-water mark by virtue of a chain of title reaching back to the sovereign, and owns to the center of the stream by grace of the state, subject, however to public rights.—Franzini v. Layland, Wis., 97 N. W. Rep. 499.

14. BRIDGES—Extension of Charter.—The further extension of an old toll bridge charter is not equivalent to grant of new charter.—State v. City of Bangor, Me., 56 Atl. Rep. 589

15. BRIDGES—Liability of Owner for Negligence.—The owner of land, over which the public has been allowed for a number of years to use a road leading across a small bayou, where a bridge is negligently constructed and falls beneath the weight of a man and a mule, is liable for the damages suffered.—Lawson v. Shreveport Waterworks Co., La., 35 So. Rep. 890.

16. BUILDING AND LOAN ASSOCIATIONS—Rights of Members on Insolvency.—Member of building association, on insolvency thereof, held not to be a creditor, but entitled only to *pro rata* share of the assets.—Walker v. Terry, Ala., 35 So. Rep. 466.

17. CARRIERS—Delay in Shipment.—In order to recover for delay in shipment of live stock, it is necessary to show that a longer time was actually consumed than was necessary for the purpose.—Johnston v. Chicago, B. & Q. R. Co., Neb., 97 N. W. Rep. 479.

18. CARRIERS—Injury to Caboose Passenger.—Passenger on caboose at end of freight train, injured while passing from the caboose to the station, held entitled to recover for the negligence of the defendant railroad company.—Chicago, B. Q. R. Co. v. Troyer, Neb., 97 N. W. Rep. 308.

19. CARRIERS—Instructions in Action for Failure to Stop Train.—In an action by a passenger for defendant's failure to stop a train, an instruction on willful disregard of defendant's duty to stop held properly modified by inserting the words "capriciousness or recklessness," in addition to "willfulness and wantonness."—Yazoo & M. V. R. Co. v. Mitchell, Miss., 35 So. Rep. 339.

20. COMPROMISE AND SETTLEMENT—Action on Note.—In an action by payee against maker of note, defendant could not interpose defense inconsistent with written contract of indemnity made by plaintiff.—Prouty v. Adams, Cal., 74 Pac. Rep. 845.

21. CONSTITUTIONAL LAW—Co-Operative Telephone Company.—Discontinuance of service by a co-operative telephone company, previously rendered to a subscriber, held not to deprive him of his property without due process of law.—Irvin v. Rushville Co-Operative Telephone Co., Ind., 69 N. E. Rep. 258.

22. CONSTITUTIONAL LAW—Dentistry Without a License.—Sess. Laws 1897, p. 144, ch. 43, prohibiting the practice of dentistry without a license from the state board, held not unconstitutional as class legislation.—Gothard v. People, Colo., 74 Pac. Rep. 890.

23. CONSTITUTIONAL LAW—Factional Disputes in Political Parties.—Sess. Laws 1901, p. 169, ch. 71, giving state central committees of political parties exclusive jurisdiction to determine factional disputes, held not in violation of Const. art. 6, § 11, as an infringement on the judicial department of the government.—People v. District Court of Second Judicial Dist., Colo., 74 Pac. Rep. 896.

24. CONSTITUTIONAL LAW—Freight Rates.—Const. § 215, held not to prohibit a railroad company from charging a through freight rate less than the sum of the local rates between two points.—Southern Ry. Co. v. Commonwealth, Ky., 77 S. W. Rep. 207.

25. CONSTITUTIONAL LAW—Inheritance Tax.—A taxing act, which exceeds the legislative power of taxation and violates the provisions of the constitution, is not law and the person subjected to said tax is deprived of his property without due process of law.—Appeal of Nettleton, Conn., 56 Atl. Rep. 565.

26. CONTRACTS—Damages for Breach.—A finding that plaintiff suffered no damages from breach of contract before bringing action held not equivalent to finding that claim was without foundation.—Parker v. McKannon Bros. & Co., Vt., 56 Atl. Rep. 536.

27. CONTRACTS—Marriage Brokerage.—A contract to hasten an intended marriage is as obnoxious to the objection that it is a marriage brokerage contract as a contract to bring about a marriage between strangers.—Jangraw v. Perkins, Vt., 56 Atl. Rep. 532.

28. CONTRACTS—Rescission as Affecting Arbitration Clause.—Arbitration clause in contract for construction of railroad held not to perfect action by contractor on rescission of contract by the other party.—Dobbling v. York Springs Ry. Co., Pa., 56 Atl. Rep. 349.

29. CONTRACTS—Where Made if by Telephone.—A contract made by telephone by persons in different counties is made where the person is who accepts the offer of the other.—Bank of Yolo v. Sperry Flour Co., Cal., 74 Pac. Rep. 855.

30. CORPORATIONS—Authority of Executive Committee—Acts of two members of a corporation's executive committee held to bind the corporation to the extent of the committee's authority.—John A. Roebling's Sons Co. v. Barre & M. Traction & Power Co., Vt., 56 Atl. Rep. 530.

31. CORPORATIONS—Constitutional Law.—Const. art. 4, § 14, relating to the organization of corporations under the general law, does not apply to charters previously granted, though amended subsequently.—State v. City of Bangor, Me., 56 Atl. Rep. 589.

32. CORPORATIONS—Misnomer.—Use of the word "the" in a declaration, before the title of defendant corporation, where true title contains no "the" is a misnomer.—Lapham v. Philadelphia, B. & W. R. Co., Del., 56 Atl. Rep. 366.

33. COSTS—Suing as Poor Person.—An application for an order to sue as a poor person, which fails to show that the applicant has a good cause of action, is fatally defective.—Wemyss v. Allan, 85 N. Y. Supp. 91.

34. COUNTIES—Validity of Action Respecting Treasurer's Salary.—A county treasurer, after the expiration of his term, held not entitled to question the validity of the action of the board attempting to fix the salary.—People v. Steuben County, 85 N. Y. Supp. 244.

35. COURTS—Inquiry Into Solvency of Surety on Appeal Bond.—The court *a qua* can inquire into the solvency of the surety on an appeal bond, though the appeal has been lodged in the supreme court.—State v. St. Paul, La., 35 So. Rep. 389.

36. CRIMINAL TRIAL—Argument of Counsel.—The court may stop counsel for accused from arguing a proposition of law to the jury plainly at variance with the accepted law of the state.—State v. Menard, La., 35 So. Rep. 360.

37. CRIMINAL TRIAL—Assault with Intent to Murder.—Charges in prosecution for assault with intent to murder containing implications as to inference of malice or intent to kill, held not cause for reversal.—Keady v. People, Colo., 74 Pac. Rep. 892.

38. CRIMINAL TRIAL — Confronting Witnesses. — The right guaranticd accused to be confronted with witnesses is accorded, if he is so confronted on his preliminary examination, or at any one of several trials, and is then afforded an opportunity for cross-examination.—State v. Banks, La., 35 So. Rep. 870.

39. CRIMINAL TRIAL — Reading of Indictment. — Defendant in a criminal case may waive the formal reading of the indictment, and may consent, in the absence of the original indictment, to have the copy read from the indictment record. — Shivers v. Territory, Okla., 74 Pac. Rep. 899.

40. CRIMINAL TRIAL—Withdrawal of Attorney. — Refusal of trial judge to permit attorney for accused to withdraw after continuance has been refused and a jury called works no injury to the defendant. — State v. Fuller, La., 35 So. Rep. 395.

41. DEPOSITIONS—Enforceability of Subpœna in Action Pending in Another State.—Subpœna to appear before foreign commissioner and give testimony for use in a suit pending without the state held enforceable.—*In re* Lee, 85 N. Y. Supp. 224.

42. DIVORCE—Temporary Alimony.—The part of a decree for temporary alimony which adjudged that defendant should pay $50 "on demand, if necessary," for plaintiff's benefit, held void.—Cope v. Cope, Mo., 77 S. W. Rep. 92.

43. ELECTIONS—Contest —On an election contest, the proof required to rebut the presumption that votes were legally cast must be sufficient to render the existence of the requisite negative proof probable. — Rexroth v. Schein, Ill., 69 N. E. Rep. 240.

44 ELECTIONS — Distinguished Marks on Ballot.—A cross placed after and beyond the square on a ballot, in which the cross should be placed, renders the ballot illegal.—Rexroth v. Schein, Ill., 69 N. E. Rep. 240.

45. ELECTION OF REMEDIES — Vendor's Lien After Barring of Note.—Where a vendor of land sued to recover on the note for the purchase price and to foreclose the vendor's lien retained, and defendant pleaded the statute of limitations, the vendor could elect to sue for the land. — Sanders v. Rawlings, Tex., 77 S. W. Rep. 41.

46. ELECTRICITY—Defective Insulation of Wires.—In an action for injuries by defective insulation of wire, held, that the question of defendant's negligence and plaintiff's contributory negligence was for the jury.—Fitzgerald v. Edison Electric Illuminating Co., Pa., 56 Atl. Rep. 350.

47. EMINENT DOMAIN—Right to Dismiss Action.—Right of plaintiff to dismiss the action to condemn held not taken away by a stipulation as to entry of judgment on certain conditions arising.—Southern California Mountain Water Co. v. Cameron, Cal., 74 Pac. Rep. 838.

48. EQUITY — Vendor's Lien. — Equity will enforce a vendor's lien against the grantee, though solvent, and though the grantor has an adequate remedy at law under a covenant of warranty. — Johnson v. Burks, Mo., 77 S. W. Rep. 133.

49 ESTOPPEL—To Deny Investment of Funds.—An agent who causes the party from whom he has received funds to believe that they are profitably invested cannot urge that the funds, when called on to account, were deposited all the time in bank.—Beugnot v. Tremoulet, La., 35 So. Rep. 369.

50. EVIDENCE—Insolvency of Deceased.—The fact that no administration of the estate of a decedent was had authorizes the rebuttable inference that he died insolvent.—Johnson v. Burks, Mo., 77 S. W. Rep. 133.

51. EVIDENCE—Modification of Agreement by Parol.—A trust deed, conveying lands for the payment of a decedent's debts, could not be changed by parol into a mortgage to secure the grantee as surety for the debts of the widow.—Christian v. Highlands, Ind., 69 N. E. Rep. 266.

52. EXECUTION—Quit-Claim Deed.—Where title to real estate is evidenced by quit claim deed, and the adverse claimant claims under an execution sale against a debtor who is not shown to have ever had title to the land, the title conveyed by the quit-claim is paramount. —Mosier v. Momsen, Okla., 74 Pac. Rep. 905.

53. EXECUTORS AND ADMINISTRATORS—Claim for Extra Services Rendered Deceased.—In an action to recover from a decedent's estate for extra services rendered deceased, evidence that witness was employed in deceased's family, and while there she was working for deceased and relied upon her for her pay, was competent.—Elwell v. Roper, N. H., 56 Atl. Rep. 342.

54. EXECUTORS AND ADMINISTRATORS—Decree of Distribution.—Where a probate court entered a decree of distribution of an estate of a testatrix, directing the distribution of the estate under the conditions and as provided in the will, equity could not interfere.—Kauffman v. Gries, Cal., 74 Pac. Rep. 846.

55. EXECUTORS AND ADMINISTRATORS — Evidence in Claim Against Estate.—A writing by a father held admissible, in an action after his death, against his administrator, by his son and daughter-in-law, for services in nursing him and his wife.—Lillard v. Wilson, Mo., 77 S. W. Rep. 74.

56 EXECUTORS AND ADMINISTRATORS — Individual Liability.—Where an executor takes money not belonging to the estate and refuses to pay it to the owner, he is individually liable therefor.—Hunnicutt v. Higginbotham, Ala., 35 So. Rep. 469.

57. EXECUTORS AND ADMINISTRATORS — Mortgagor's Insolvency. — The administrator of a deceased mortgagor held entitled to avoid the mortgage, as void as to creditors. — Hemley v. Harmon, Mo., 77 S. W. Rep. 136.

58. EXECUTORS AND ADMINISTRAORS — Necessity of Appointment.—Where the largest claim against a succession is of an heir, and the debts to third persons are insignificant, and one of the heirs offers to secure them by bond, and the heirs are all majors, it is proper to refuse to appoint an administrator.—Succession of Wintz La., 35 So. Rep. 377.

59. FIRE INSURANCE—Admissions in Pleading.—Where, in an action on a fire insurance policy, the pleadings admit that the structure insured was a building, it will be regarded as having acquired identity as a building, though not completed —Bode v. Firemen's Ins. Co. of Newark, Mo., 77 S. W. Rep. 116.

60. FORCIBLE ENTRY AND DETAINER—Character of Possession.—The fact that plaintiff's possession was not taken in good faith for the purpose of occupation, but was a mere sham and pretense, will defeat an action of forcible entry.—Buck v. Endicott, Mo., 77 S. W. Rep. 85.

61. FRAUDS, STATUTE OF—Contract to Rear Minor.—Minor's abandonment of house of third person agreeing to rear him held not to destroy part performance of contract, relied on to take case out of statute of frauds. —Jones v Comer, Ky., 77 S. W. Rep. 184.

62 FRAUDS, STATUTE OF — Delivery and Acceptance Without Change of Possession. — Acceptance and receipt of goods, under statute of frauds (Gen. St. 1902, § 1090), without change of custody, can be shown only by clear and unequivocal proof. — Devine v. Warner, Conn., 56 Atl. Rep. 562.

63. GARNISHMENT—Liability of Garnishee. — Judgment cannot be recovered against a garnishee on his answer, unless there is a direct admission of a legal debt. — Jefferson County Sav. Bank v. Nathan, Ala., 35 So. Rep. 355.

64. GARNISHMENT—Oral Answer.—Where a plaintiff in garnishment is not satisfied with the answer of the garnishee, he should contest it, alleging in what respect the answer is untrue.—Jefferson County Sav. Bank v. Nathan, Ala., 35 So. Rep. 355.

65. GUARANTY — Presentment of Draft to Drawee.— Where a bank made advances on drafts drawn by a con-

signor of fruit against the consignee, held, that it was not a condition precedent to liability of guarantor of the drafts that the bank should have presented them to drawees.—First Nat. Bank v. Bowers, Cal., 74 Pac. Rep. 856.

66. HEALTH—Appointment by Legislature of Health Officer.—It is competent for legislature to appoint or direct the appointment of health officers, and impose expenses necessarily incurred by them on the municipalities for which they are appointed.—Keefe v. Town of Union, Conn., 56 Atl. Rep. 571.

67. HIGHWAYS—Surface Water. — The raising of the grade of a highway for about five inches at a point where surface water flowed over the same held a proper repair, notwithstanding it turned back surface water onto plaintiff's land.—Hart v. Sigman, Ind., 69 N. E. Rep. 262.

68. HOMICIDE—Justification.—Shooting an officer, who merely announces his purpose of making an arrest, held not justified on the part of the person about to be arrested.—Keady v. People, Colo., 74 Pac. Rep. 892.

69 HOMICIDE—While Under Influence of Liquor.—Where, on a prosecution for homicide, there was evidence tending to show that defendant was at the time of the homicide under the influence of liquor, it was not error to charge on temporary insanity caused by recent use of ardent spirits.—Holloway v. State, Tex., 77 S. W. Rep. 14.

70. HUSBAND AND WIFE—Implied Contract for Services.—An action for services rendered substantially all by the wife should be brought by her alone, under Rev. St. 1899, §§ 6864, 6869, relating to rights of married women. —Lillard v. Wilson, Mo., 77 S. W. Rep. 74.

71. HUSBAND AND WIFE—Separate Property.—A married woman is bound by the covenants in her deeds to her separate property.—McGuigan v. Gaines, Ark., 77 S. W. Rep. 52.

72. INJUNCTION — Delay in Instituting Suit. — Two weeks' delay before instituting suit for injunction, after giving direct notice of a violation of rights in erection of a structure, is not unreasonable.—Fisk v. Ley, Conn., 56 Atl. Rep. 539.

73. INJUNCTION—To Compel Gas Company to Furnish Gas.—The proper remedy to compel a gas company to furnish a prospective consumer with gas is mandamus, and not injunction. — Johnson v. Atlantic City Gas & Water Co., N. J., 56 Atl. Rep. 550.

74. INJUNCTION—To Prevent City Treasurer From Taking Office.—An injunction by an *ad interim* city treasurer to prevent his successor from taking charge on account of irregularity in his election, is dissolvable on bond.—State v. Ellis, La., 35 So. Rep. 471.

75. INTOXICATING LIQUORS—Contract in Violation of Liquor Laws.—Where a nonresident contracts with a resident as his agent to sell liquor at wholesale within the territory, and procures no license, he cannot, where the agent has failed to account, maintain an action on such contract.—Ruemmeli v. Cravens, Okla., 74 Pac. Rep. 908.

76. INTOXICATING LIQUORS—Indictment. — An indictment for illegal sale of liquor, which alleges a sale by defendant and another, and that such other had no license, is defective for failure to allege that defendant had no license.—State v. Holder, N. Car., 45 S. E. Rep. 862.

77. JUDGES—Examination of Juror.—Act of trial judge, after district attorney and defendant had passed the jury for cause, in examining juror as to citizenship and excusing him, held not cause for reversal.—Keady v. People, Colo., 74 Pac. Rep. 892.

78. JUDGMENT—Ground of Recovery.—Judgment denying foreclosure of a mortgage, on the ground that the mortgage was invalid, is no bar to a subsequent action to recover on the note secured by the mortgage.—Curtin v. Salmon River Hydraulic Gold Mining & Ditch Co., Cal., 74 Pac. Rep. 851.

79. LIMITATIONS—Death of Mortgagee.—Death of creditor held not to prolong the period of limitations on matured obligation until an administrator is appointed.—Stanton v. Gibbins, Mo., 77 S. W. Rep. 93.

80. LIMITATION OF ACTIONS—New Promise.—The written acknowledgment, equivalent to a new promise to pay, must contain an unqualified admission of a present debt, which the party is liable to pay.—Thornton v. Nichols & Lemon, Ga., 45 S. E. Rep. 785.

81. LIMITATION OF ACTIONS—New Promise to Pay.—A written statement by the payor of the amount paid on a note, and of the consequent balance, made for another purpose, is not an express acknowledgment, nor an express promise to pay. — Davis v. Davis, Me., 56 Atl. Rep. 588.

82. MASTER AND SERVANT—Assumed Risk.—Where a servant voluntarily assented to occupy the place prepared for him in which to work, such assent obviated the master's duty to furnish him a safe place.—Christiensen v. Rio Grande Western Ry. Co., Utah, 74 Pac. Rep. 876.

83. MASTER AND SERVANT—Assumed Risk —A master may assume that one employed as a skilled and experienced workman on a certain kind of machine knew and appreciated the dangers liable to arise from operation of such machines, equipped as were those in common use.—Saucier v. New Hampshire Spinning Mills, N. H., 56 Atl. Rep. 545.

84. MASTER AND SERVANT—Duty to Furnish Light on Defective Stairs.—If light is necessary for the reasonably safe use of defective stairs in the nighttime by employees going out of the factory, the duty to furnish it cannot be delegated by the master.—English v. Amidon, N. H., 56 Atl. Rep. 548.

85. MASTER AND SERVANT—Inconsistency of Defenses. —The defenses of contributory negligence and assumption of risk do not rest upon the same principles, and the existence of one necessarily excludes the existence of the other.—Ball v. Gussenhoven, Mont., 74 Pac. Rep. 871.

86. MASTER AND SERVANT—Injury While Passing over Elevator Door.—Plaintiff, in an action for injuries while attempting to pass over automatic elevator doors, held guilty of contributory negligence as a matter of law.—Connors v. Merchants' Mfg. Co., Mass., 69 N. E. Rep. 218.

87. MASTER AND SERVANT—Negligence of Foreman.—A foreman of a gang of men held guilty of negligence in ordering certain timber lowered into a trench in which another servant was at work.—Chesapeake & O. Ry. Co. v. Board, Ky., 77 S. W. Rep. 189.

88. MECHANICS' LIENS — Application of Payments.—Where an architect had already applied payments on his claim for services, he could not thereafter apply such payments in liquidation of another claim, for which he was not entitled to a lien.—Spalding v. Burk, Wash., 74 Pac. Rep. 829.

89. MECHANICS' LIEN—Nonperformance of Contract.—Failure of materialmen to furnish materials as contracted for held to prevent the enforcement of a lien, and to render them liable to the owner for resulting damages.—Woolf v. Schafer, 85 N. Y. Supp. 205.

90. MINES AND MINERALS—Adverse Claimant. — Mere knowledge of the existence of a vein of ore within the limits of a claim, not adopted as claimant's own discovery and used as the basis of his claim, held insufficient to establish a claim.—McMillen v. Ferrum Min. Co., Colo., 74 Pac. Rep. 461.

91. MINES AND MINERALS — Contract of Sale Construed.—Contract for the sale of mine lands construed, and the words "available coal" held to apply to coal under a creek and railroad running through the land.—*In re* Redstone Oil, Coal & Coke Co.'s Dissolution, Pa., 56 Atl. Rep. 355.

92. MINES AND MINERALS—Ejectment Against Persons in Possession.—Defendants held not entitled to

damages on the theory that an injunction prevented their working a mine, it having merely restrained them from selling or disposing of any ore from it.—Benton v Hopkins, Colo., 74 Pac. Rep. 891.

93. MORTGAGES—Assignment of Part of Debt.—An assignment of a distinct part of a debt, secured by mortgage, carries with it a *pro tanto* interest in the mortgage and a lien to the extent of such interest.—Miller v. Campbell Commission Co., Okla., 74 Pac. Rep. 507.

94. MORTGAGES—Joinder of Parties.—A husband, who was not joined as a party to an action to foreclose a mortgage given by his wife, in which he did not join held not bound by the judgment.—Deusch v. Questa, Ky., 76 S. W. Rep. 329.

95. MORTGAGES—Knowledge of Heir.—One to whom mortgaged land descends must be held to have a knowledge of the terms and conditions of the mortgage.—Fleming v. Hager, Iowa, 96 N. W. Rep. 752.

96. MUNICIPAL CORPORATIONS — Acceptance of Sidewalk by Council.—After the work of constructing a sidewalk has been accepted by town trustees, a property owner cannot escape liability by proof that the work was not done in accordance with the ordinance.—Eversole v. Walsh, Ky., 76 S. W. Rep. 358.

97. MUNICIPAL CORPORATIONS—Acceptance of Street Improvement.—In the absence of fraud, the acceptance of a street improvement by the common council, as prescribed by statute, is conclusive on the property owner as to the character of the work and the materials used.—Lux & Talbott Stone Co. v. Donaldson, Ind., 68 N. E. Rep. 1014.

98. MUNICIPAL CORPORATIONS — Change of Street Grade.—It is no defense to an action for damages from a change in a street grade that plaintiff purchased the property with knowledge that the order for the change had been made by the city.—Pickles v. City of Ansonia, Conn., 56 Atl. Rep. 552.

99. MUNICIPAL CORPORATIONS—Damage from Change of Street Grade.—A city held to be under no moral obligation to an abutting owner to pay damages for a change of grade in a street sufficient to support a law authorizing such payment in the face of Const. art. 8, § 10, relating to disposition of city funds.—People v. Phillips, 85 N. Y. Supp. 200.

100. MUNICIPAL CORPORATIONS—Demand Should Precede Action Against.—Under New York city charter, laws 1897, p. 92, ch. 378, § 261, a demand on the comptroller held a condition precedent to the maintenance of an action against the city, and demand on corporation counsel is insufficient.—Smith v. City of New York, 85 N. Y. Supp. 150.

101. MUNICIPAL CORPORATIONS — Excuse for Non-Presentation of Claim Within Required Time.—Incapacity to transact business held excuse for noncompliance with municipal charter provisions requiring claims for injuries to be presented within 30 days. — Ehrhardt v. City of Seattle, Wash., 74 Pac. Rep. 827.

102. MUNICIPAL CORPORATIONS—Extension of Streets.—The fact that a number of streets and alleys in a village have never been improved, and have been for some years within the inclosure of private persons, does not prevent their recovery by the village.—Village of Lee v. Harris, Ill., 69 N. E. Rep. 230.

103. MUNICIPAL CORPORATIONS—Health Officer Not a City Employee.—A health officer of a city is not an employee, within Municipal Code, § 189, providing that all employees in such department shall not be removed, except for cause assigned and after a hearing.—State v. Craig, Ohio, 69 N. E. Rep. 228.

104. MUNICIPAL CORPORATIONS—Patented Pavements.—A patented pavement may be laid in New York city, where dealers in similar pavements have a fair opportunity to compete.—Barber Asphalt Paving Co. v. Willcox, 85 N. Y. Supp. 166.

105. MUNICIPAL CORPORATIONS—Previous Knowledge of Defective Sidewalk.—Previous knowledge of a dangerous place in a sidewalk held not *per se* evidence of such negligence as will preclude recovery. — Carson v. City of Genessee, Idaho, 74 Pac. Rep. 862.

106. MUNICIPAL CORPORATIONS—Removal of Sidewalk for Nonpayment of Assessment.—A sidewalk laid by a village held to become part of the lot owner's real property, so that, the village having removed it merely because he would not pay an assessment therefor, it is liable to him.—Platt v. Village of Oneonta, 84 N. Y. Supp. 699.

107. MUNICIPAL CORPORATIONS—Right to Assume Obligation of Keeping Bridge in Repair.—A municipality has authority by contract to release a railway company from, and itself to assume, all obligation to keep in repair a bridge constituting a part of the public highway.—Hicks v. Chespeake & O. Ry. Co., Va., 45 S. E. Rep. 888.

108. MUNICIPAL CORPORATIONS—Right to Extend Limits.—Legislature may extend limits of municipality, though property acquired will not benefit in return for municipal burdens imposed.—Hollister v. City of Rochester, 85 N. Y. Supp. 147.

109. MUNICIPAL CORPORATIONS — Special Tax Bills.—Under Kansas City Charter, art. 9, § 23, held, that the lien of a special tax bill continues, for all its installments, for a year after the last installment becomes due on its face, though it became due earlier because of default in payment of the other installments.—Barber Asphalt Pav. Co. v. Meservey, Mo., 77 S. W. Rep. 137.

110. NAVIGABLE WATERS — Interference With Easement.—Proportion of benefit and detriment in interference with easement does not affect property owner's right of enjoyment unchanged, except in so far as it might influence the court in exercising discretion as to injunction.—Fisk v. Loy, Conn., 56 Atl. Rep. 559.

111. NAVIGABLE WATERS—Objection to Rendition of Judgment.—A party held not estopped, by consent to a judgment after statutory time, from thereafter objecting to its rendition.—Lawrence v. Cannavan, Conn., 56 Atl. Rep. 556.

112. NEW TRIAL—Option of Remittitur. — Where the court below directs a new trial unless plaintiff will within 10 days remit part of her recovery, and plaintiff appeals from the order before the 10 days have expired, she will not be entitled to another option in the supreme court.—Swett v. Gray, Cal., 74 Pac. Rep. 489.

113. OFFICERS—Appointments. — Where the appointment of an officer is a nullity, because he is by statute ineligible, a legal appointment may be made without first ousting such first appointee by *quo warranto*.—State v. Craig, Ohio, 69 N. E. Rep. 228.

114. PARTNERSHIP—Limited Partnership.—Parties attempting in good faith to form a limited partnership but failing, held liable only to the extent of their unpaid subscriptions. — Deckert v. Chesapeake Western Co., Va., 45 S. E. Rep. 799.

115. PATENTS—Damages for Infringement Increased by Court.—The conduct of a defendant in persisting in the palpable infringement of a patent after notice thereof, and in causing all the delay and expense possible in the litigation, held to warrant the court in exercising its discretionary power under the statute to increase the damages awarded to complainant. — National Folding Box & Paper Co. v. Robertson's Estate, U. S. C. C., D. Conn., 125 Fed. Rep. 524.

116. PATENTS—Infringement.—As against an infringer, the patentee in a United States patent for an invention previously made by him and patented in a foreign country may, to avoid alleged use in this country before the date of the foreign patent, show the date of the application for the foreign patent for the purpose of showing the actual date of his invention. — Badische Anilin & Soda Fabrik v. A. Klipstein & Co., U. S. C. C., S. D. N. Y., 125 Fed. Rep. 543.

117. PATENTS—Proof of Infringement.—Testimony of a competent expert as to the identity of a chemical com-

pound sold by defendant with that of a patent, based upon on an analysis and the application of the tests specified in the patent, is sufficient *prima facie* to prove infringement.—Badische Anilin & Soda Fabrik v. A. Klipstein & Co., U. S. C. C., S. D. N. Y., 125 Fed. Rep. 543.

118. PLEADING—Affidavit to Amendment Made by Attorney's Clerk.—Objection that affidavit, filed with motion for leave to amend complaint, was made by managing clerk of plaintiff's attorney, instead of by plaintiff, held not well taken.—Kent v. Ætna Ins. Co., 85 N. Y. Supp. 164.

119. PLEADING—Illegality of Contract. — Where the illegality of a contract sued on appears from plaintiff's evidence, the defendant may take advantage of this defense, though not pleaded.—McClure v. Ullman, Mo., 77 S. W. Rep. 325.

120. PLEADING—Inconsistency of Defenses.—A defendant is entitled to plead in the same answer as many defenses as he may wish to present, even though inconsistent with each other.—Ball v. Gussenhoven, Mont., 74 Pac. Rep. 871.

121. PLEADING — Variance. — Defendant cannot urge surprise, on variance of proof from complaint, where its answer alleged and its defense was interposed on the theory to which the proof was directed. — Meals v. De Soto Placer Min. Co., Wash., 74 Pac. Rep. 470.

122. PRINCIPAL AND AGENT — Revocation of Power of Attorney.—Where a person applied for a loan, and appointed the lender's agent his attorney in fact to execute a note and mortgage, and died before the loan was completed, held, that the power of attorney was terminated by his death.—Brown v. Skotland, N. Dak., 97 N. W. Rep. 543.

123. PRINCIPAL AND SURETY — Building Contract. — Where a bond is conditioned for the erection of a building, on a judgment for the full amount of the penalty interest cannot exceed the penalty. — Westcott v. Fidelity & Deposit Co., 84 N. Y. Supp. 731.

124. PROCESS—Objection to Form and Sufficiency.—An objection to the form or sufficiency of a summons cannot be taken by answer. — Nellis v. Rowles, 84 N. Y. Supp. 753.

125. PUBLIC LANDS—Limitations.—The right of way of a railroad company having been acquired from the general government, limitations are no defense to an action by the company to recover possession of a strip of land within such right of way.—McLucas v. St. Joseph & G. I. R. Co., Neb., 97 N. W. Rep. 312.

126. RAILROADS—Injury at Crossing. — Plaintiff cannot recover for injuries at crossing, though no signals were given, if guilty of contributory negligence. — Gosa v. Southern Ry., S. Car., 45 S. E. Rep. 810.

127. RAILROADS — Proximate Cause of Injury. — The fact that railroad employees running a locomotive and cars against standing cars, which are thereby projected against another engine, whose fireman is underneath it, were not aware of the fireman's position, does not conclusively negative negligence. — Chicago & E. I. R. Co. v. Stephenson, Ind., 69 N. E. Rep. 270.

128. RAILROADS—Rate of Speed.—A rate of speed of 30 miles an hour by a train outside of any city or town limits is not evidence of negligence.—Hajsek v. Chicago, B. & Q. R. Co., Neb., 97 N. W. Rep. 327.

129. RECEIVERS—Appointment.—An objection that no receiver, either temporary or permanent, can be appointed before disposing of a demurrer to a complaint in which the appointment of a receiver is applied for, is without merit.—Cogswell v. Second Nat. Bank, Conn., 56 Atl. Rep. 574.

130. RECEIVERS—Motion for Judgment.—A motion by a receiver of a corporation for a judgment for money held to be a compliance with a direction to institute "suits at law."—Reed & McCormick v. Gold, Va., 45 S. E. Rep. 868.

131. REFORMATORIES—Injury to Convict. — Charitable institution, to which convict minors are legally committed, held not liable to them for damages sustained resulting from negligence —Corbett v. St. Vincent's Industrial School of Utica, N. Y., 68 N. E. Rep. 997.

132. REMOVAL OF CAUSES — Prejudice or Local Influence.—A cause is removable on the ground of prejudice or local influence by any one of two or more defendants who is a citizen of another state, although joined with another who is a citizen of the same state, and although there is no separable controversy. — Holmes v. Southern Ry. Co., U. S. C. C., W. D. N. Car., 125 Fed. Rep. 301.

133. REPLEVIN — Joint Ownership. — Joint owner of cattle held entitled to replevin for his equal share against co-tenant, who had repudiated the ownership of plaintiff.—Corbett v. Hall, Mo., 77 S. W. Rep. 122.

134. REPLEVIN—Possession of Goods.—A *prima facie* case of regularity of possession of goods by a marshal is made by admission that he holds them under an execution issued on a judgment rendered.—Gruber v. Janns, 84 N. Y. Supp. 882.

135. SALES—Market Value.—There may be a market value of a particular commodity at a particular place where it is to be delivered after sale, whether it be kept there constantly in stock for sale or not.—Coxe Bros. & Co. v. Anoka Waterworks, Electric Light & Power Co., Minn., 97 N. W. Rep. 459.

136. SALES — Property of Purchaser on Installment Plan Converted by Third Party.—Purchaser of property on installment plan held entitled to recover full value from third person converting the same, though he had not completed payment. — Messenger v. Murphy, Wash., 74 Pac. Rep. 480.

137. SALES—Rescission of Contract.—Where a vendee enters into a written contract for the purchase of goods, the vendor may deliver the goods or tender them to the vendee, though he has given notice that he will not accept them.—Backes v. Black, Neb., 97 N. W. Rep. 321.

138. SALES—Subsequent Purchasers.—A contract of sale which has not been completely executed will not entitle the purchaser thereunder to retain the goods as against a subsequent purchaser.—Low v. E. J. Broad & Co., Tex. 77 S. W. Rep. 28.

139. SALES—Variance Between Pleadings and Proof.—Variance between the pleadings and proof in an action for goods sold and delivered held not material, in the absence of any showing that the defendant was prejudiced.—Butler Bros. v. Hirzel, 84 N. Y. Supp. 693.

140. WILLS—Subsequent Legacies. — Where a will directed trustees to pay a legacy to testator's son on his arriving at age from the accumulated income, it was their duty to take out of each year's income an amount which, with interest, would produce the legacy on such date.—United States Trust Co. v. Soher, 85 N. Y. Supp. 266.

141. WILLS—Testamentary Capacity.—In a will contest, unequal division among children of testator may be considered in determining mental capacity.—Graham v. Deuterman, Ill., 69 N. E. Rep. 237.

142. WITNESSES—Alterations in Contract.—A question whether a corporation, represented by the witness, had knowledge of alterations in a contract, the witness having testified that he had not, was properly excluded.—United States Fidelity & Guaranty Co. v. Dampskibsaktieselskabet Habil, Ala., 35 So. Rep. 344.

143. WITNESSES—Impeachment.—The state cannot read in evidence defendant's application for a continuance for the purpose of impeaching one of defendants' witnesses.—Wilburn v. State, Tex., 77 S. W. Rep. 3.

144. WITNESSES—Introduction of Exhibits on Cross Examination.—A party should not be allowed to introduce exhibits on cross examination of his adversary's witness, unless they contradict something the witness has testified to in chief, or are intimately connected with something about which he has testified.—Kroetch v. Empire Mill Co., Idaho, 74 Pac. Rep. 808.